No. SC94526

In the Missouri Supreme Court

STATE OF MISSOURI,

Respondent,

v.

CHRISTOPHER CLAYCOMB,

Appellant.

Appeal from Clinton County Circuit Court
Forty-Third Judicial Circuit
The Honorable J. Bartley Spear, Jr., Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946

P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
greg.barnes@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF FACTS

Appellant ("Defendant") was convicted of criminal nonsupport, a class D felony in violation of § 568.040,[1] following a bench trial in the Circuit Court of Clinton County.[2] Defendant was sentenced by the court to four years' imprisonment; execution of that sentence was suspended and Defendant was placed on probation for five years.[3]

The sufficiency of the evidence to convict is at issue.

Prior to the start of the bench trial, when the judge asked if there were any preliminary matters, defense counsel stated:

> Judge, basically, it's going to be a minimal period. We've got our—our position is, he's been unable to work during the pendency of this action, and we have medical records to support our stance. So it's –it's—I don't know that there's a whole lot of contesting that he hasn't paid.

(Tr. 5).

---

[1] All statutory citations shall be to RSMo (2000) as modified through RSMo (Cum. Supp. 2004), unless otherwise indicated.

[2] The case was tried by the Honorable J. Bartley Spear, Associate Circuit Judge of DeKalb County, by assignment (Tr. 3).

[3] The trial transcript will be cited as "Tr." The verdict and sentencing transcript will be cited as "Sent. Tr." The legal file will be cited as "L.F."

Defendant's opening statement mentioned medical problems and inability to obtain employment, but said nothing in contravention of the State's allegations concerning payment, and said nothing about any in-kind aid being supplied for the child. (Tr. 6).

Viewed in the light most favorable to the verdict, the evidence and reasonable inferences therefrom at trial established the following facts:

Defendant had a child, T.J.C., with his ex-wife, Jacqueline Green; the couple divorced in March 2004 (Tr. 7). Under the divorce judgment, Defendant was ordered to pay child support in the amount of $247 per month (Tr. 8).

The child resided with his mother from August 1, 2005 to July 31, 2006; Defendant failed to pay child support in more than six months of that 12-month time period (Tr. 8, 9). Nor did Defendant make direct payments to the mother for any sort of food, clothing, or lodging for the minor child (Tr. 9).

Mother was not aware of anything that would have prevented Defendant, either physically or mentally, from being able to pay child support during that time period (Tr. 9). Mother testified that the then 13-year-old child told her that Defendant and his paramour were running a bar in Lathrop. (Tr. 9-10). Mother did not see Defendant regularly at that time. (Tr. 9).

The State placed into evidence Defendant's certified pay history pursuant to § 454.539, which was received as Exhibit A without objection (Tr. 10).[4] Defendant made no child support payments in October, November, or December of 2005, and no payments in January, February, March, April, May, June, or July of 2006 (Exhibit A).

Defendant testified in his own defense and admitted that he had been ordered to pay child support for the child (Tr. 12). Defendant said he had last worked in July 2007 (after the time period in question) (Tr. 12). Defendant thought he was employed between August 1, 2005 and July 31, 2006; Defendant did construction (Tr. 12-13). Defendant's current "significant other" used to own a bar (Tr. 13).

Defendant was not suffering from any medical ailments from August 2005 to July 2006 (Tr. 13). Defendant admitted that he helped out at the bar his "significant other" owned, but said he did not work for a wage (Tr. 13-14). Defendant admitted that he got behind on child support, but claimed that he

[4] Section 454.539.2 provides that, "Such records shall constitute prima facie evidence of the amount of support paid."

later caught up and paid in full (Tr. 14).[5] Defendant said he "paid in cash." (Tr. 13). While Defendant claimed to be disabled, he had been denied disability (Tr. 14).

Defendant's closing argument claimed only that he had paid up, based on Defendant's testimony, until he became unemployed because of a medical illness and that he had been unable to work until that time. (Tr. 15). Defendant made no reference to in-kind aid. (Tr. 15).

After taking the case under advisement to review Defendant's pay history and medical records, the court found that limiting the inquiry to the specific charging period at issue, Defendant was guilty beyond a reasonable doubt (Sent. Tr. 3-4). The court requested a Sentencing Assessment Report (Sent. Tr. 4).[6]

---

[5] According to Exhibit A, Defendant also made no child support payments in August 2006, but came current by the end of September 2006. Defendant made payments in only 7 of the 82 subsequent months (Exhibit A).

[6] According to the SAR, Defendant received a 10-year sentence for use of hashish while in the military; Defendant admitted being incarcerated for 57 months by the United States Army but claimed he was not sentenced to 10 years and claimed not to recall the charge. (Sent. Tr. 7-8).

Defendant disagreed with the "tone" of the Victim Impact Statement regarding "the reasons for the failure to—to pay as opposed to any specific facts[,]" but there was "no particular part of it that he would say was not correct." (Sent. Tr. 8-9).

Because the prosecution recommended probation, the court sentenced Defendant to a four-year prison term, but suspended execution of the sentence and placed Defendant on probation with conditions for five years (Tr. 12-13). The court noted that it would have sent Defendant to the Department of Corrections for two years if the prosecution had asked it to do so (Tr. 13-14).

The Missouri Court of Appeals, Western District, affirmed Defendant's conviction and sentence by per curiam order and memorandum opinion on September 2, 2014. *State v. Claycomb*, No. WD76062 (Sept. 2, 2014). On November 25, 2014, this Court granted Defendant's application for transfer.

ARGUMENT

The evidence was sufficient to find Defendant guilty of criminal nonsupport for failure to provide support for his minor son because the proof of the relationship of parent to child is sufficient to establish a *prima facie* basis for a legal obligation of support, and while a child support order is not required, it may be considered evidence of what constitutes adequate support. The State established that Defendant had failed to pay any support whatsoever in 10 months of the 12-month period charged through Defendant's certified pay history, which is "prima facie evidence of the amount of support paid" and was sufficient to establish that the offense was a class D felony. (Addresses Defendant's Points I and II)

Defendant's first point contends that there was insufficient evidence to find him guilty of criminal nonsupport. Defendant acknowledges that the State's evidence established that Defendant "stopped paying" child support after September 2005 until September 2006; he thereby admits he failed to pay court-ordered child support in at least 10 of the 12 months from August 1, 2005 to July 31, 2006. (Substitute Brief for Appellant at 8). Defendant contends that because no questions were asked by either side concerning in-kind support, the evidence was insufficient. However, the State made a

prima facie case, the defense produced no evidence of support during this time frame, and Defendant cites no case law for his position that the State is required to affirmatively disprove the hypothesis that he may have made in-kind payments to support a child living with its mother in the face of "prima facie" evidence that he failed to pay child support through the official system, or to make any direct payments to the mother for the child's food, clothing, lodging, and medical or surgical attention.

A. Standard of Review

In a jury-waived case, the trial court's finding of guilt has the force and effect of a jury verdict. Rule 27.01(b); *State v. Barnett*, 767 S.W.2d 38, 39 (Mo. banc 1989). This Court reviews the sufficiency of the evidence as though a jury had returned a verdict of guilty. *State v. Giffin*, 640 S.W.2d 128, 130 (Mo. 1982); *State v. Degraffenreid*, 877 S.W.2d 210, 212 (Mo. App. S.D. 1994).

In determining the sufficiency of the evidence to support a conviction, this Court does not weigh the evidence but accepts as true all evidence tending to prove guilt, together will all reasonable inferences that support the verdict, and ignores all contrary evidence and inferences. *State v. Holmes*, 399 S.W.3d 809, 812 (Mo. banc 2013). This Court asks only whether there was sufficient evidence from which the trier of fact reasonably could have

found the defendant guilty. *Id.*[7] "This is not an assessment of whether the Court believes that the evidence at trial established guilt beyond a reasonable doubt but rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt." *State v. Miller*, 372 S.W.3d 455, 463 (Mo. banc 2012) (internal quotation and citation omitted). This standard "echoes the due process standard announced by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 [(1979).]" *State v. Chaney*, 967 S.W.2d 47, 52 (Mo. banc 1998).

Missouri appellate courts "should abide by the well-established standard of review for challenges to the sufficiency of the evidence to support a criminal conviction" "[r]ather than second-guessing the trier of fact[.]" *State v. Porter*, 439 S.W.3d 208, 212 (Mo. banc 2014). "When reviewing the sufficiency of the evidence, the Court does not act as a 'super juror' with veto powers" but rather "gives great deference to the trier of fact." *Id.*; *State v. Grim*, 854 S.W.2d 403, 414 (Mo. banc 1993).

---

[7] As Defendant acknowledges, the standard of review is the same whether or not a challenge to the sufficiency of the evidence was previously made at or post-trial. (Substitute Brief for Appellant at 24.) Therefore, the Court need not reach the issue of whether this is a "plain error" case.

The State does not have an "affirmative duty to disprove every reasonable hypothesis except that of guilt." *State v. Chaney*, 967 S.W.2d at 54; *State v. Grim*, 854 S.W.2d at 405-408.

B. The criminal nonsupport statute

"The support of one's children involves the discharge of one of the most basic responsibilities that a person assumes as a member of society." *State v. Reed*, 181 S.W.3d 567, 570 (Mo. banc 2006) (quoting *In re Warren*, 888 S.W.2d 334, 336 (Mo. banc 1994)). The criminal nonsupport statute "has as its foundation the object of securing to children from their parent the discharge of the duty of support, and the punishment of those who are so morally bankrupt as to refuse or ignore that obligation." *State v. Davis*, 675 S.W.2d 410, 415 (Mo. App. W.D. 1984) (quoting *State v. Arnett*, 370 S.W.2d 169, 174 (Mo. App. Spr.D. 1963)). Missouri's criminal nonsupport statute "is predicated upon the theory that both parents have a legal obligation to look after and provide for their offspring, and that the failure to perform that obligation, without good cause, is a punishable offense against the state." *State v. Degraffenreid*, 877 S.W.210, 213 (Mo. App. S.D. 1994 (quoting *State v. Davis*, 469 S.W.2d 1, 3 (Mo. 1971) (applying predecessor criminal nonsupport statute).

Since the legislature has removed the adjective "necessary" and refined the term "support" to include "adequate food, clothing, lodging, medical or

surgical attention," conviction will lie "whether or not the child actually suffered 'physical or material want or destitution'" *Davis*, 675 S.W.2d at 414 (quoting *State v. Osborne*, 413 S.W.2d 571 (Mo. App. K.C.D. 1967)).

Every parent has a legal obligation to provide for his or her children regardless of the existence of a child-support order. *Reed*, 181 S.W.3d at 570. The proof of the relationship of parent to child is sufficient to establish a *prima facie* basis for a legal obligation of support. *Id*. The existence of a child support order is merely evidence of what constitutes adequate support. *Id.* "While a child support order is not conclusive regarding what constitutes adequate support, a complete failure to pay child support is evidence of failure to pay adequate support." *Holmes,* 399 S.W.3d at 815.

"[A] parent commits the crime of nonsupport if such parent knowingly fails to provide, without good cause, adequate support which such parent is legally obligated to provide for his child or stepchild who is not otherwise emancipated by operation of law." § 568.040.1. "Good cause" means any substantial reason why the defendant is unable to provide adequate support. Good cause does not exist if the defendant purposely maintains his inability to support. § 568.040.2(2). "Support" means food, clothing, lodging, and medical or surgical attention. § 568.040.2(3). "Adequate support" is a question of fact for the trier to decide. *State v. Link*, 167 S.W.3d 763, 766 (Mo. App. W.D. 2005).

If the person obligated to pay child support commits the crime of nonsupport in each of six individual months within any twelve-month period, or if the total amount of support which the defendant knowingly failed to provide was in excess of $5,000, it was a class D felony under the version of the statute in place at the time of the Defendant's offense. § 568.040.4.

C. The evidence was sufficient. (Addresses Defendant's Point I)

In the case at bar, the State established, and Defendant admitted under oath, that the child was his and that the court had ordered him to pay monthly child support of $247 per month. The proof of the relationship of parent to child was sufficient to establish a *prima facie* basis for the legal obligation of support. *Reed*, 181 S.W.3d at 570. The child support order was evidence of what constitutes adequate support. *Id.* Defendant failed to rebut this evidence with any evidence whatsoever that he had provided support of any kind, monetary or in-kind, during the charged time frame.

Mother testified that the child lived with her throughout the period in question (Tr. 8). Defendant made no direct payments to her for any sort of food, clothing, or lodging for the minor child (Tr. 9). Mother further testified that Defendant did not pay child support at all in more than six months of that 12-month time period (Tr. 9). State's Exhibit A established that Defendant made no payments of any kind in 10 of the twelve months of that period (Tr. 10). The certified pay history admitted as Exhibit A constitutes

"prima facie evidence of the amount of support paid." Section 454.539.2. A complete failure to provide child support is evidence of failure to pay adequate support. *Holmes*, 399 S.W.3d at 815.

While Defendant supplied no evidence that he provided in-kind assistance, this Court has held that supplying housing and food during visitation rights does not satisfy a defendant's support obligations. *Holmes*, 399 S.W.3d at 815.

Defendant does not contest on appeal that he had the ability to pay some amount of support for his son during the time period in question. Defendant admitted that he had no medical problems during that time period and thought that he was working in construction at that time, in addition to assisting his significant other at a bar she owned without receiving wages (Tr. 12-14). By his own admission, he worked up until July 2007, which is after the period in question (Tr. 12). Defendant admitted that there were months that he did not pay and that he had been denied disability (Tr. 14).

As noted above, "support" means "food, clothing, lodging, **and** medical or surgical attention[.]" § 568.040.2(3) (emphasis added). Defendant is therefore obligated to provide support in **each** of these four areas. The State established that Defendant provided no support to mother for any of the four areas, (Tr. 9, Exhibit A), for more than six months of that twelve-month time

period (according to mother's testimony) and during ten of those twelve months (as demonstrated by Exhibit A).

Because the State established a *prima facie* case of criminal nonsupport with proof that Defendant knowingly failed to provide adequate support for his son without good cause, the evidence was sufficient and Defendant's first point should be rejected. *Holmes*, 399 S.W.3d at 815. *See also*, MAI-CR 322.08 (1997).

D. State had no burden to disprove hypothesis that Defendant may have provided in-kind assistance.

Defendant argues the State must affirmatively disprove the hypothesis that he provided in-kind assistance directly to the child or through third parties. The only previous case to so hold, *State v. Nichols*, 725 S.W.2d 927 (Mo. App. E.D. 1987), was decided in an era when it was the State's responsibility in a "circumstantial evidence" case to demonstrate that the "operative facts supporting the conviction must be consistent with each other, consistent with guilt, inconsistent with any reasonable theory of innocence and must exclude every reasonable hypothesis of innocence." *Id*. at 928. The court's holding in that case centered on the claim that "the state's evidence leaves room for a reasonable hypothesis of [defendant's] innocence" where the child was away at college and it was possible defendant had "also" provided "room and board, books, weekend meals and transportation" or other items of

statutory support such as clothing, or contributed support to the child directly. *Id*. at 930.

This is no longer the standard and, in any event, Defendant's child lived with the mother. *Nichols* is no longer controlling as was made clear by *State v. Degraffenreid*, 877 S.W.2d 210, 214-215 (Mo. App. S.D. 1994). In *Degraffenreid*, the defendant affirmatively introduced evidence that he had provided in-kind support to his minor children for six weeks of every summer and on three weekends of every month during the periods they stayed with him; the court held that whether this constituted "adequate support" was a question of fact. *Id*. at 214.

Although Defendant relied upon *Nichols* in seeking transfer, Defendant does not cite it in his brief to this Court. In this case, unlike *Degraffenreid*, Defendant failed to introduce evidence that he provided any in-kind support, much less "adequate support." Admittedly, in *Degraffenreid*, there was evidence of both the fact that Defendant paid "no decretal child support to his former wife and no support money into the registry of the circuit court" during the charged period and "that he made no contribution to the two daughters' food, clothing, lodging, and medical or surgical needs when the girls were residing with their mother." *Id*. However, under the standard of review, the trier of fact was entitled to draw a reasonable inference that the custodial parent was feeding and lodging the child, and there was no evidence

that Defendant made any "contribution" to his clothing, medical or surgical needs. *See*, *id*.

Defendant in essence seeks to return to the days when the State had to disprove every "reasonable hypothesis" of innocence, a standard this Court expressly repudiated in *Grim*, *supra*.

This would be an unreasonable burden, since the State would potentially have to call all minor children (no matter how young), all relatives through whom assistance could possibly have been funneled, all creditors of the family whom a Defendant could conceivably have paid for food, clothing, lodging, or medical care, and representatives of all banks (known and unknown) holding accounts for family members through which deposits may have been funneled for such needs. Should such evidence exist, it is Defendant who is in the best position to provide it to rebut the State's case, which is "prima facie" by statute for a reason.

Defendant cites no case supporting his proposition, and understandably, other jurisdictions have rejected such a suggestion.

In *Gustman v. State*, 660 N.E.2d 353 (Ind. App. 1996), the Indiana Court of Appeals found the evidence sufficient to support a guilty plea for criminal nonsupport where the defendant "had come [nowhere] close to meeting his obligation" for child support despite making some payments, the defendant "did not visit significantly with the child, and thus, the record does

not support any inference that [the defendant] provided the child with any meaningful amount of food, clothing, shelter, or medical care[,]" and the defendant "has never asserted that he provided his child with food, clothing, shelter, or medical care so as to relieve him of criminal liability for nonsupport." *Id.* at 356. The court found "an adequate factual basis" for the defendant's conviction of criminal nonsupport. *Id.* This is despite the fact that in Indiana, a defendant may escape criminal liability if he "provided more than a mere token amount of support." *Id.* at 355. *See also, Cooper v. State*, 760 N.E.2d 660, 667-668 (Ind. App. 2002) (support payments directly to children did not fall within exception allowing credit for payments made directly to custodial parent; providing a dependent child with food, clothing, shelter or medical care in "more than a mere token amount of support" would allow parent to escape criminal liability for nonsupport, but in light of large arrearage, "any support [defendant] directly provided to [child] during summer" when defendant gave child $20-$40 per week for clothes, school supplies and toys, and took child camping almost every week for 2-3 days at a time insufficient to escape criminal liability); *Grimes v. State*, 693 N.E.2d 1361, 1363 (Ind. App. 1998) (defendant more than 50% delinquent on child support; unspecified amounts of pizza, boots and camouflage clothing, money used to buy clothes at yard sale, and payment of $35 doctor bill over four-year period "minimal" or "token" and insufficient to escape criminal liability).

In *State v. Eagle*, 110 P.3d 1111 (Or. App. 2005), the Oregon Court of Appeals held that where the state's criminal nonsupport statute provided criminal liability if "the person refuses or neglects without lawful excuse to provide support for" his child, the evidence was sufficient to sustain a conviction when, viewed in the light most favorable to the state, it showed that the defendant failed to make support payments over a significant number of years during which he was without disabilities and was capable of working and providing support. *Id.* at 1113. No affirmative burden to disprove in-kind support is mentioned. *See*, *id.*

In Nevada, a defendant is guilty of criminal nonsupport if he knowingly fails to provide for the support of his minor child. Nev. Rev. Stat. Ann. § 201.020.1(b). The Nevada Supreme Court has held that the required elements are: 1) parentage; 2) defendant owed a legal obligation to pay child support (e.g., through a court order); 3) defendant knew or should have known of the obligation; and 4) that defendant willfully failed to support his children. *Epp v. State*, 814 P.2d 1011, 1013 (Nev. 1991). The State can establish willfulness by showing that a defendant: 1) had the ability to generate income; 2) earned wages during the time period in question; and 3) failed to make child support payments. *Id.* No affirmative burden to disprove in-kind assistance is mentioned in the interpretation or elements of the statute. *See*, *id.*

In *Taylor v. State*, 710 P.2d 1019 (Ak. App. 1985), the Alaska Court of Appeals held that failure to comply with monthly child support payments "constitutes at least *prima facie* evidence of failure to provide 'support.'" *Id.* at 1024.

Nor is such a rule illogical. Defendant had every incentive to provide support in a manner resulting in credit against his child-support obligation, making an inference by the trier of fact that he did not provide assistance reasonable. Furthermore, Defendant is free to rebut the State's *prima facie* case with evidence of in-kind assistance and is in the best position to do so.

Because the State made a *prima facie* case, and the evidence and reasonable inferences therefrom established that Defendant did not support his son during the charged period (a fact Defendant did not contest at trial), Defendant's first point should be rejected.

E. The State presented evidence of what constitutes adequate support through the child support order. (Addresses Defendant's Point II)

While Defendant's second point contends that the State failed to establish what constituted "adequate support," a child support order, while not required, may be considered evidence of what constitutes adequate support. *Reed*, 181 S.W.3d at 570. Moreover, "[w]hile a child support order is not conclusive regarding what constitutes adequate support, a complete

failure to pay child support is evidence of failure to pay adequate support." *Holmes*, 399 S.W.3d at 815.

The testimony of the mother that Defendant failed to pay any support in more than six months of the 12-month period in question, combined with Exhibit A, which established that Defendant paid no support whatsoever in 10 months of the 12-month charged period, demonstrated "a complete failure to pay child support," which "is evidence of failure to pay adequate support." *Holmes*, 399 S.W.3d at 815. Moreover, the order itself is evidence of what constitutes adequate support, and this evidence was not rebutted in any way. *See*, *Reed*, 181 S.W.3d at 570.

Defendant's second point should therefore be rejected. *See also, State v. Orando*, 284 S.W.3d 188, 191 (Mo. App. E.D. 2009) (substantial evidence of knowing failure to pay child support where defendant knew of his parent-child relationship and defendant was aware of decree ordering support that had not been modified).

CONCLUSION

Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Gregory L. Barnes
GREGORY L. BARNES
Assistant Attorney General
Missouri Bar No. 38946

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
greg.barnes@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4,507 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2010 software; and

2. That a copy of this notification was sent through the eFiling system on this 26th day of January, 2015, to:

Damien De Loyola
920 Main Street, Ste. 500
Kansas City, Missouri 64105
Damien.deLoyola@mspd.mo.gov

/s/ Gregory L. Barnes
GREGORY L. BARNES
Assistant Attorney General